

No. 337219

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

ZACHARY JOSEPH BIGGS,

Defendant/Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The undersigned was appointed by letter to represent Zachary Biggs for this appeal on February 24, 2017 following the Commissioner's Order dated February 23, 2017 granting previous counsel's motion to withdraw. Prior counsel filed Appellant's Brief on February 19, 2017. The undersigned adopts and incorporates that brief and adds the following information from the record and additional analysis as follows.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court abused its discretion or misapplied RCW 9.94A. 589 in holding that a continuous sexual assault charged as two counts of Rape constituted separate and distinct conduct, and incorrectly imposed consecutive sentences for the two convictions.

2. The trial court erred by imposing mandatory legal financial obligations without making any inquiry as to Mr. Biggs' present or future ability to pay.

Issues Pertaining to Assignments of Error

1. Did the court err by determining that the two counts of first degree rape were not the same criminal conduct?

2. Did the court err by imposing mandatory and discretionary legal financial obligations without making any inquiry as to Mr. Biggs' present or future ability to pay?

III. STATEMENT OF THE CASE

On January 22, 2014 Zachary Biggs was charged with Rape in the First Degree with the Special Allegation that at the time of the commission of the crime he was armed with a deadly weapon other than a firearm. CP 26.

The charges were based on an incident that occurred on December 10, 2013. Zachary Biggs' estranged wife, Stacey Biggs went to his residence to deliver a box of food. There were pending divorce proceedings in the Second Judicial District of Idaho for Nez Perce County Cause No. CV13-02153. There was also an active Domestic Violence Protection Order in that case that prohibited Zachary Biggs from having any contact with Ms. Biggs. See Finding of Fact No. 1 at CP 175.

Mr. Biggs met her at the door of the residence, pushed her into his room, locked the door, threatened her with a machete; then forced her to have oral sex, then vaginal sex. See Findings of Fact 2 to 7. CP 175 - 176.

Mr. Biggs believed that Stacey Biggs might be someone (or something) who had raped him in the past. And, this person or entity was wearing a mask to disguise [his/her/its] identity. Zachary repeatedly told Stacey she was going to have sex with him for the purposes of proving she was Stacey Biggs. See Findings of Fact 3 to 5. CP 175.

Stacey Biggs testified that for the last several years Mr. Biggs had had been showing signs of mental illness and he had started becoming violent towards her. RPII-A 179. She recounted an incident where Mr. Biggs woke up in the morning falsely believing that someone had drugged them and raped them the night before. RPII-A 181.

During the December 10, 2013 incident Zachary told Stacey he had recently been raped three times, and his assailants had made a mask of his face and were going around using his mask and getting in trouble. RPII-A 194-195.

He was also “digging” at her face, and her lips, nose and eyes during the assaults to see if she was wearing a mask; telling her, “I’m seeing if you are really Stacey.” RPII-A 197. Later, he told her, “If you don’t make love to me like my wife I’m going to stab you.” RPII-A 203. Then, while he was having vaginal intercourse with her on the floor, he stopped (“pulls up”) and told her, “That’s not how my wife does it” and he reached for the machete. Ms. Biggs apologized and explained that her back hurt and asked to get up on the bed. RPII-A 203. They relocated to the bed and immediately resumed vaginal intercourse. RPII-A 205. Stacey Biggs testified that Zachary Biggs was experiencing a total break from reality during this incident:

I thought he was going to kill me. And all I kept thinking was my kids. I’d never seen him like that -- like -- He was gone -- he’d just checked out. (Inaudible) before when he’d be mad and we’d get into it he’d be mean but it was like he’d snap out and you could still see like a -- like, compassion, kind of, behind his eyes, like, “Oh, man, I messed up. I’m really sorry sorry,” like he’d wake up. But this time there was like nothing in his eyes. It was like he was gone, like he was just looking through me like I was nothing like -- like he was gone, just -- poof, checked out. RPII - A 205.

Then finally, when he finished having intercourse with her, he announced that she had proven she was Stacey Biggs, telling her, “See, that’s why I married you. I love you.” And, “I missed that” and “I will never let you go. You’re my wife.” RPII-A 205.

Mr. Biggs’ attorneys and the State moved for a competency examination and an Order for Examination by Eastern State Hospital was entered on January 22, 2014. CP 45. The evaluation was conducted by Psychologist, Daniel Lord-Flynn, PhD. He prepared a report that was filed under seal on October 3, 2014. CP 58. Dr. Lord-Flynn determined that Mr. Biggs had the capacity to understand the court proceedings and participate in his own defense. CP 59. He also diagnosed a personality disorder (Schizotypal and Antisocial Features). CP 60. He states in the report:

Within the police reports, there are descriptions of Mr. Biggs having some unusual mental health symptoms and history. His ex-wife has indicated she believes he was getting paranoid beginning about four years ago. ... She described Mr. Biggs as having cycles of paranoia, believing there are aliens that make and wear masks pretending to be people, and there were descriptions of his believing he had been drugged and sexually violated. CP 62.

...

Mr. Biggs denied having any symptoms of mental illness. He was specifically asked about the alleged delusional beliefs that were described in the police reports. He denied having those beliefs to the extremes noted in the police reports.

Although no specific delusional beliefs were identified or acknowledged, Mr. Biggs did describe some beliefs that might be considered fringe beliefs or eccentricities. However, he did not

appear to hold these beliefs to the level that would be considered to be a delusion. There are no indications from the limited information available to me that he has tended to espouse these beliefs (sic) to any significant extent. The irregularities in his personal beliefs would be more consistent with a diagnosis of Schizotypal Personality Disorder. **At times of substantial stress it is possible that individuals with such a personality disorder may experience brief psychotic episodes. Those episodes of psychosis are typically transient and will fade without any medications.** The antisocial personality traits reflect some of his past legal history, tendencies to be impulsive, and egocentricity. CP 63. (Emphasis added).

On April 7, 2015 Mr. Biggs pleaded guilty to an amended Information charging him with of Rape in the Second Degree (non-domestic violence). CP 85 - 86; CP 90 - 100; RPI 83 - 91. The guilty plea was entered pursuant to a plea agreement and the sentence range was stipulated to be 95 - 125 months. CP 100.

However, on June 1, 2015 Mr. Biggs moved to withdraw his guilty plea. The grounds for the motion for withdrawal of the guilty plea was that Defendant's counsel erroneously informed him that he would be eligible for the Special Sex Offender Sentencing Alternative (SSOSA) and that Defendant relied on that when he entered his guilty plea. CP 119 - 125. Under RCW 9.94A.670(2)(a), an offender found guilty of Rape in the Second Degree is ineligible for a SSOSA. The order withdrawing the plea was entered on June 16, 2015. CP 128.

Then, on June 26, 2015 Zachary Biggs was charged by a Third Amended Information with; Count 1, Rape in the First Degree, Count 2, Rape in the First Degree, and Count 3, Domestic Violence Court Order Violation (Felony). Each of the Counts had special allegations that the crime was committed against a family or household member as defined in RCW 10.99.020 and that the Defendant was armed with a deadly weapon other than a firearm. CP 131-132.

Mr. Biggs waived his right to a jury trial on March 15, 2015. CP 80. The case was ultimately set for a bench trial that began July 30, 2015 RPII-A 107. The trial concluded the next day, and after hearing argument, and reviewing the testimony and exhibits, Judge Scott Gallina returned to the bench to give his decision. He found Mr. Biggs guilty on Counts 1, 2, and 3; Counts 1 and 2 having been committed against a family or household member, and while armed with a deadly weapon; and Count 3 also with a deadly weapon enhancement. CRIII 434.

Judge Gallina described the facts and his reasoning in detail. He noted the testimony of one of the Sheriff's deputies, who said that Mr. Biggs had called him to come and talk with him at the jail, and told him that his face had been twice copied for silicone masks. CRIII 438. Judge Gallina then stated:

What troubles me most in this case is the bizarre nature of Mr. Biggs' statements, and the fact that no attempt's been made to explain them. I'm left to guess is this the result of some kind of mental illness on Mr. Biggs' part, some kind of disassociation disorder that he has. Is this the result of drug use? You know, I've heard some of both, but nobody's ever connected the dots, either from the prosecution or the defense in this case as to why these bizarre statements were being made. CRIII 439.

Judge Gallina concluded that he did not know "why these things happened but I don't doubt the offense as charged occurred." CRIII 439.

The Findings of Fact and Conclusions of Law After Bench Trial (CP 182-187) were entered and the sentencing hearing took place on August 20, 2015.¹

Judge Gallina noted in Findings of Fact Nos. 3 to 6 that Mr. Biggs believed Stacey Biggs and he had been drugged and raped at a concert a few years earlier (Ms. Biggs denied this ever happened); that during the attack Mr. Biggs told Stacey Biggs that she was going to have sex with him for the purpose of proving who she was; and while she was on the floor he again began accusing her of being an imposter. CP at 183.

Also, in Finding of Fact No. 14 Judge Gallina recounted the testimony of Deputy Jeffrey Polillo. Mr. Biggs was in jail for assaulting

¹ The findings and conclusions are set forth in full in the Brief of Appellant filed herein on January 19, 2017 at page 2 - 8 and at CP 182-187.

his brother two days after he assaulted Stacey Biggs. Mr. Biggs requested that Dep. Polillo come see him in jail, claiming he had information concerning terrorism. He told Dep. Polillo that on two occasions someone drugged him and made silicone masks of his face while they sexually assaulted him. He claimed to have seen someone who was wearing one. He further claimed he saw a cell phone video of Stacey Biggs entering the back door of his mother's residence and being grabbed by someone in a black coat. CP at 185.

Sentencing was scheduled for August 20, 2015. A Pre-Sentence Investigation Report (PSI) was filed a week earlier on August 13, 2015. CP 139. The author notes that she contacted Mr. Biggs on August 6, 2015 so see if he would like to do a PSI interview and complete the PSI questionnaire. Mr. Biggs declined to be interviewed or complete the questionnaire, stating the questionnaire he completed on May 28, 2015 after his guilty plea should be sufficient and that he had nothing more to say. CP at 145 and 148.

At the sentencing hearing, the State and Mr. Biggs' counsel concentrated on the issue whether the two Counts of Rape should be considered the "same criminal conduct" and sentenced concurrently under

RCW 9.94A.589(1)(a), or “separate and distinct criminal conduct” to be sentenced consecutively under RCW 9.94A.589(1)(b).²

Mr. Biggs exercised his right to allocution (CRIII 470 - 479), and then the Court sentenced him to 186 months to Life on Count 1 and 117 months to Life on Count 2, to be run consecutively for a total of 303 months, and 54 months plus 6 months on the enhancements on Count 3. Regarding the issue of concurrent or consecutive time for the two counts of Rape in the First Degree, the Court stated:

THE COURT: All right.

Obviously, Mr. Biggs, you’re going to be sentenced to life today. I do so order. With respect to the low end, the standard range calculation, it’s kind of a mixed bag for me. I don’t believe that these were the same criminal conduct. The question is, is there an opportunity somewhere in the evolution of events for you to stop, reflect, and change course.

DEFENDANT: May I say something, your Honor?

THE COURT: No. I don’t think so. At the point where she’s crying, and she says, “Look, if you’re going to do this, at least let me get off the floor.” That to me sounds like an excellent opportunity to cease and desist at that point; say, “You know what? I’m not going to do this. You’re right.” But it didn’t stop there. It escalated. And you say that she expressed love, adoration, whatever -- various points throughout this encounter. But love exacted at knifepoint or at the end of a machete, you got to question the sincerity of the proclamation. And I do.

...

² The State’s argument is found at CRIII 451- 453 and 466 - 467. Defense Counsel’s argument is found at CRIII 459 - 461.

Based on the sentencing range that's available to me, 309 is the low end of the determinate portion of the sentence. Life is the higher end. I believe that the 309 is appropriate in your case, because of questions that I have relative to your mental state at the time that this was committed. Some of the things that were -- unrefuted in the testimony were just troubling. And I don't know why things came about like they did. I don't know if you have some organic deficiency. That wasn't presented to me. I don't know if you had drug-related problems. That wasn't presented to me. I don't know. I just know that the testimony that I heard was troubling. And the picture that was painted was troubling.

CRIII 480-481.

IV. SUMMARY OF ARGUMENT

Present counsel for Mr. Biggs adopts and incorporates the arguments and authorities set forth in the Brief of Appellant filed by his previous attorney on January 19, 2017. The undersigned has expanded the discussion as to whether the superior court abused its discretion or misapplied the law by determining that the crimes committed by defendant were separate and distinct criminal conduct and therefore imposed consecutive sentences for the two rape convictions. It is the Defendant's position that the only viable conclusion under the facts of this case are that the penetrations were the same criminal conduct and concurrent sentences should be imposed.

The undersigned has also expanded the discussion whether the court erred by imposing fines and legal/financial obligations without addressing Mr. Biggs' ability to pay.

V. ARGUMENT

1. The trial court abused its discretion or misapplied RCW 9.94A. 589 in holding that a continuous sexual assault charged as two counts of Rape constituted separate and distinct conduct, and incorrectly imposed consecutive sentences for the two convictions.

The general rule in Washington is that sentences for multiple current offenses will run concurrently. RCW 9.94A.589(1)(a). But RCW 9.94A.589(1)(b), provides an exception. Sentences for “serious violent offenses arising from separate and distinct criminal conduct” must run consecutively. See *State v. Weatherwax*, 188 Wash.2d 139, 392 P.3d 1054 (2017).

The supreme court in *State v. Tili*, 139 Wash 2d 107, 985 P.2d 365 (1999) noted that while “same criminal conduct” is defined in the statute, “separate and distinct criminal conduct” is not, nor is there other legislative guidance to assist the court to determine legislative intent. Therefore, the *Tili* court determined that the definition of “same criminal conduct” would be used to define its antonym, “separate and distinct criminal conduct,” under the principle that each provision of a statute should be read in relation to the statute’s other provisions.” *Id* at 122 - 123.

For multiple crimes to be treated as same criminal conduct at sentencing, the crimes must have (1) been committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent. *Tili*, 139 Wash.2d at 123, 985 P.2d at 374. See also, RCW 9.94A.589(1)(a). “The absence of any one of these [three] prongs prevents a finding of same criminal conduct.” *State v. Porter*, 133 Wash.2d 177, 181, 942 P.2d 974 (1997); See also *State v. Vike*, 125 Wash.2d 407, 410-11, 885 P.2d 824 (1994) (The relevant inquiry is “the extent to which the criminal intent, objectively viewed, changed from one crime to the next.... This, in turn, can be measured in part by whether one crime furthered the other.”)

In *Tili* and the case at bar, the crimes involved the same victim, the same place, and “were nearly simultaneous in time.” *Id.* The issue is whether the defendant’s “criminal intent, when viewed objectively, changed from one crime to the next.” *Id.* That is, to be “separate and distinct criminal conduct” the defendant must have formed new criminal intent between the first and the subsequent penetrations such that the rapes were sequential - and not simultaneous or continuous. 139 Wash.2d at 124, 985 P.2d at 375.

(a) Standard of review. Appellate courts review a trial court’s determination of what constitutes the “same criminal conduct”

for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wash.2d 531, 295 P.3d 219 (2013). “Under this standard, when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* (citing *State v. Rodriguez*, 61 Wash.App. 812, 816, 812 P.2d 868 (Div. 2, 1991). “But where the record adequately supports either conclusion, the matter lies in the court's discretion.” *Id.* The defendant bears the burden of proving that the multiple crimes were the “same criminal conduct” under the theory that a moving party bears the burden to present sufficient facts to warrant the exercise of the court’s discretion in his or her favor. *Graciano*, 176 Wash.2d at 539 - 540, 295 P.3d at 223- 224.

(b) Analysis.

“For multiple crimes to be treated as same criminal conduct at sentencing, the crimes must have (1) been committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent.” *Tili*, 139 Wash.2d at 123. There will be no dispute that the crimes here were committed at the same time and place, and that they involved a single victim. The issue is whether Zachary Biggs had “the same objective criminal intent” throughout the entire episode from the first sexual assault to the second.

Zachary Biggs sexually assaulted Stacey Biggs operating under the delusional belief she might be an imposter wearing a mask disguised as her. He believed she could prove whether she was Stacey Biggs or an imposter by having sex with him. The trial court recognized this in findings of fact 3, 4, 5, and 6:

3. The Defendant either let her up or stood her up and then pushed her into his bedroom and locked the door. He pushed her onto the bed, retrieved a machete, threatened her with it and began accusing her of wearing a mask, and being an imposter and having been involved in raping him in the past. The machete was approximately two feet long, all black with an eighteen-inch blade that had a serrated back bone.

4. The Defendant believed that he and Stacey Biggs had been drugged at a community concert event and that they were then raped a few years earlier. This event did not happen according to Stacey, but the Defendant continued to believe that it did and claimed to be looking for the people who did this.

5. At some point during the attack, the Defendant told Stacey that she was going to have sex with him for the purposes of proving who she was. He began forcing her to perform fellatio on him, penetrating her mouth with his penis, causing her to gag. Stacey acceded to his demands out of fear due to his threats and use of the machete.

6. The Defendant then demanded vaginal intercourse and pushed her to the floor where, out of fear, she again acceded to his command. While on the floor, the Defendant decided that she was not participating to his satisfaction, he began accusing her of being an imposter and threatened her with the machete. Stacey begged him and told him that it was just because her back hurt from a previous car accident

injury and asked to move to the bed. The Defendant then moved her to the bed and again engaged in vaginal intercourse with her. Stacey feared for her life and continued to accede to him. CP 183-184.

In his competency evaluation report Dr. Lord-Flynn described this ideation as:

The irregularities in his personal beliefs would be more consistent with a diagnosis of Schizotypal Personality Disorder. **At times of substantial stress it is possible that individuals with such a personality disorder may experience brief psychotic episodes. Those episodes of psychosis are typically transient and will fade without any medications.** CP 63. [Emphasis added].

The supreme court in *State v. Tili* illustrates how to analyze whether two sexual assaults were committed with the same objective criminal intent for purposes of sentencing. 139 Wash.2d at 123-24.

The *Tili* court examined *State v. Grantham*, 84 Wash.App. 854, 932 P.2d 657 (Div. 2, 1997) where the defendant first violently raped a woman anally, then after the rape he violently beat her:

Grantham then started kicking her legs and telling her to get up and turn around. He called her names and repeatedly told her to "hurry up." When she didn't respond, he started kicking her harder, on the thigh, then in her ribs. L.S. remained on her knees until finally Grantham grabbed her face and chin and turned her to face him. At this point he was standing over her and threatening her not to tell. L.S. testified that Grantham then "kept like grabbing my face and I kept, you know, trying to stay as far back from him as I could. I'm grabbing my face and he said come here. And I look up and I was like what? Will you take me home? Will you please stop? I was crying and I

asked him to please stop.”

84 Wash.App. at 856. After that, he decided to rape her orally and used additional violence to complete the second rape. Thus, in *Grantham*, the defendant committed and completed a rape, then he switched to a different kind of physical abuse, and after that he committed a second rape. *Id.*

The *Tili* court observed that in *Grantham*, “the criminal episode had ended with the first rape (forced anal intercourse) and thereafter the defendant had the ‘time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.’ ” *Tili*, 139 Wash.2d at 123 (quoting *Grantham*, 84 Wash.App. at 859). At that point *Grantham* did not desist. He stood over her, threatened her and kicked her in her thighs and ribs. Then after he finished beating her he forced her to have oral sex. *Tili*, 139 Wash.2d at 124. The *Tili* court determined that “*Grantham* was able to form a new criminal intent before his second criminal act because his ‘crimes were sequential, *not simultaneous* or continuous.’ ” *Id.*

This case is critically distinguishable from *Grantham*. The sexual assault here was continuous and there was no break when Mr. Biggs might have paused and reflected about the wrongfulness of what he was doing. He was driven by his psychotic delusion that Stacey Biggs could be someone or something else, and he was intent she was going prove who

she was. The Court recognized at sentencing this was a continuous unbroken episode:

THE COURT: I don't believe that these were the same criminal conduct. The question is, is there an opportunity somewhere in the evolution of events for you to stop, reflect, and change course.

...

At the point where she's crying, and she says, "Look, if you're going to do this, at least let me get off the floor." That to me sounds like an excellent opportunity to cease and desist at that point; say, "You know what? I'm not going to do this. You're right." But it didn't stop there. It escalated.

The Court is correct. There was a point where he *should have* stopped and reflected -- *but he didn't*. From beginning to end he was intent on proving or disproving she was his wife by means of sexual assault.

This case is therefore analogous to *Tili* where three penetrations were continuous and uninterrupted, and the supreme court, viewing *Tili*'s unchanging pattern of conduct objectively, found it was unlikely that *Tili* formed an independent criminal intent between each separate penetration/crime. Thus, the three separate penetrations were the same criminal conduct for sentencing purposes. *Tili*, 139 Wash.2d at 124.

There is one aspect where *Tili* is distinguishable from the instant case. The sexual assault in *Tili* lasted for approximately two minutes. The *Tili* court found the short time frame was an important factor in

determining that Tili did not form independent criminal intent between the separate penetrations. *Id.* The sexual assault in the present case lasted for several hours. However, Mr. Biggs conduct, like Tili's, was unchanging, continuous and uninterrupted, and when viewed objectively, it seems clear that he did not form independent criminal intent between the separate penetrations.

Also, the duration of the sexual assaults is not dispositive. The *Tili* court contrasted *Grantham* with *State v. Walden*, 69 Wash.App 183, 847 P.2d 956 (Div. 1, 1993). There, the defendant encountered a thirteen-year-old boy who he took behind a store then dragged him up a hill and forced him to masturbate and perform oral sex on him, then he attempted to have anal intercourse with the boy. *Id.* at 184. The opinion is silent as to the duration of the sexual assaults. The supreme court approved the court of appeals' holding that, "[w]hen viewed objectively, the criminal intent of the conduct comprising the two charges is the same: sexual intercourse. Accordingly, the two crimes of rape in the second degree and attempted rape in the second degree furthered a single criminal purpose." *Tili*, 139 Wash.2d at 124; quoting *Walden*, 69 Wash.App. at 188.

As in *Walden*, Mr. Bigg's criminal intent was the same throughout the sexual assault: sexual intercourse, and accordingly, as was true in *Walden*, each penetration furthered the next and all were part of the same

general sexual assault on his victim. Under these circumstances, no changing intent can be discerned.

In sum, the conduct in this case involved the same victim, occurred at the same time and place, and involved the same objective criminal intent. This Court should therefore reverse the trial court's decision and remand this case for Mr. Biggs to receive concurrent sentences for the two rape convictions.

2. The trial court erred by imposing mandatory and discretionary legal financial obligations without making any inquiry as to Mr. Biggs' present or future ability to pay.

The trial court imposed a \$500 Crime Victim Assessment, \$1,830 in Court Costs, \$750 in Fees for court appointed attorney, \$100 Domestic Violence Assessment, \$100 Felony DNA Collection Fee, and a \$1,000 fine for a total of \$4,280; to be paid by monthly payments of \$50/month beginning 60 days after his release, or when funds become available while incarcerated. The Court made no inquiry as to Mr. Biggs' ability to pay. See 8-20-15 Sentencing transcript at RP III 482. CP 220-221.

The Washington Supreme Court held that "[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional

limitations *State v. Duncan*, 185 Wash.2d 430, 436, 374 P.3d 83 (2016). Citing; *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116 (1974). The *Duncan* court held the repayment must not be mandatory. Repayment may be ordered only if the defendant is or will be able to pay, and the financial resources of the defendant must be taken into account. 185 Wash.2d at 436. (quoting *State v. Curry*, 128 Wash.2d 911, 915-16, 817 P.2d 867 (1991)); (quoting *State v. Eisenman*, 62 Wash. App. 640, 644 n. 10, 810 P.2d 55, 817 P.2d 867 (Div. 1, 1991)).

The Supreme Court in *Fuller* stated under the 14th Amendment to the United States Constitution, “Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no ‘manifest hardship’ will result.” 417 U.S. at 46. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 600, 665, 103 S.Ct. 2064 (1983).

These mandates are clearly contradictory to the Washington statutes imposing mandatory LFOs without inquiry into the defendant’s financial resources.

Mr. Biggs’ counsel did not raise this issue below. However, RAP 2.5 vests appellate courts with discretion to review this claim of error:

Although the Court of Appeals properly declined discretionary review, RAP 2.5 governs the review of issues not raised in the trial court for all appellate courts, including this one. While appellate courts normally decline to review issues raised for the first time on appeal, *see Roberson v. Perez*, 156 Wash.2d 33,39, 123 P.3d 844 (2005), RAP 2.5 grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. (footnote omitted). *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). Each appellate court must make its own decision to accept discretionary review. **National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.** (Emphasis added).

State v. Blazina, 182 Wash.2d 827, 834-35, 344 P.3d 680 (2015).

This court should exercise its discretion and address Mr. Biggs' substantive due process challenge to the \$4,280 in LFOs on the merits. *Id.* (Quoting;).

VI. CONCLUSION

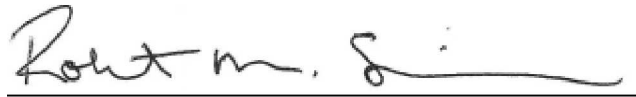
Based on the foregoing facts and authorities and those stated and cited in the Brief of Appellant filed herein on January 19, 2017, Zachary Biggs respectfully urges this court to reverse his convictions and remand for a new trial.

Or, in the alternative, for reasons set forth above and in the Brief of Appellant, Zachary Biggs respectfully asks this Court to hold that the superior court abused its discretion or misapplied the law by imposing consecutive sentences and remand this case and direct that he be

resentenced to concurrent sentences and to make an individualized inquiry into Mr. Biggs' ability to pay legal/financial obligations.

DATED this 22nd day of June, 2017.

Respectfully submitted,



Robert M. Seines, WSBA 16046
Attorney for Zachary J. Biggs

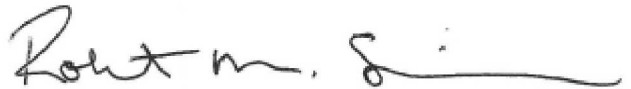
CERTIFICATE OF SERVICE

I certify that on June 22, 2017, I served Appellant's Supplemental Brief by email, as agreed, to:

Benjamin C. Nichols at
lwebber@co.asotin.wa.us.

I also mailed the Supplemental Brief by USPS on that date to:

Zachery Joseph Biggs
#361305
P.O. Box 769
Connell, WA 99326



s/Robert M. Seines

June 22, 2017 - 11:12 AM

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